UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AT&T Mobility, LLC

Respondent

and Case 05-CA-178637

Marcus Davis, an Individual

Charging Party

CHARGING PARTY'S CROSS-EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR J. AMCHAN

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I. STATEMENT OF THE CASE

A union shop steward at a mobile phone retail store made an audio recording as he represented a co-worker at her disciplinary meeting. The employer warned the steward that he—or others—could be disciplined for such activity. The employer pointed to a work rule that prohibited employees from recording conversations between themselves, between themselves and supervisors, or between themselves and third parties. The question presented is whether the employer violated Section 8(a)(1) in either communicating this warning or in maintaining the rule in question, under the given circumstances.

FACTS

The facts of this case have been well described in the parties' briefing. Therefore, the following description is limited to basic background and most pertinent facts. Marcus Davis is a union shop steward for Communications Workers of America Local 2336, working at AT&T Mobility's[1] mobile phone retail store in the District of Columbia. (ALJSuppD. 2:20-29).[2] The circumstances here arose when Davis represented a co-worker at her disciplinary meeting in a nearby store. (Tr. 33:2–10, 42:14–43:3,44:24–45:2.)[3] Davis recorded the meeting on his work and personal cell phones. (Tr. 34:10; 43:22–44:10.) Later, a supervisor chastised him for making the recording and directed that it be deleted. (Tr. 35:15–17.) Davis was warned that he and his

[1] AT&T Mobility, LLC will be referred to as "Respondent," the "company," or the "employer."

[2] The Administrative Law Judge's supplemental brief will be cited as "ALJSuppD".

[3] Counsel for the Charging Party does not have the transcript and exhibits, so citations to those sources are taken from the General Counsel's Exceptions and Brief in Support, dated August 12, 2019 and General Counsel's Answering Brief to Respondent's Exceptions, dated July 6, 2017.

fellow unit members could be disciplined for future such violations. (Tr. at 37:7-9, 47:4-8, 69:17-19.)

The company maintains at least three policies, or sets of written rules, protecting customer data[5] and a separate policy, or set of written rules, protecting employee data. The employee data protection policy is titled "Privacy in the Workplace." It states:

> The privacy of employment records (sensitive personal information, employment data, health records, etc. regarding current and former employees) is important to every employee, and all employees must maintain the security of employee records. Prevention of identity theft is just as critical for employees as it is for our customers.

(GC Exh. 2; R. Exh. 1.) Within the Privacy in the Workplace policy is the "Privacy of Communications" rule, which states:

> Employees may not record telephone or other conversations they have with their co-workers, managers, or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and with any applicable company policy.

(Id.)

The Privacy of Communications rule is at issue in this case.

ADMINISTRATIVE LAW JUDGE'S DECISIONS

The ALJ's initial decision, dated April 25, 2017, found that the Privacy of Communications Rule violated Section 8(a)(1), stating:

> In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Section 7 rights,

[5] The customer data protection policies/rules are titled "Privacy of Customer Information," "Information Security Breach," and "Access to Customer Accounts." (R. Ex. 5 at 6; R Ex. 6; R. Ex. 7.).

> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Davis' activities in the grievance meeting constituted protected activity, protection which was not forfeited by flagrant misconduct, *Thor Power Tool Co.*, 148 NLRB 1379, *enfd*. 351 F.2d 584 (7th Cir. 1965).

The Board remanded for consideration under *The Boeing Company*, 365 NLRB No. 154 (2017). In his supplemental decision, the ALJ found that the employer's "business justifications for Respondent's Privacy of Communications policy do not outweigh its adverse impact on employees' Section 7 rights and therefore its maintenance and enforcement as written violates Section 8(a)(1) of the Act. (ALJSuppD. 7:33-35.) In addition, the judge found that the company "violated Section 8(a)(1) by impliedly threatening Marcus Davis and others with discipline if they violated the rule again while engaged in protected activity." (Id. at 7:36-38.)

EXCEPTIONS

Exception 1

The Charging Party excepts to the ALJ's assertion that "[i]n *Boeing*, 365 NLRB No. 154, slip op. at 14-17 (2017), the Board overruled *Lutheran Heritage* [*v. Livonia Village-Livonia*, 343 NLRB 646 (2004)]," insofar as it implies that *Boeing* overruled all three prongs articulated in *Lutheran Heritage*, rather than only the first prong thereof.

Argument

In *Lutheran Heritage*, the Board described three situations, or "prongs," for determining whether a rule that does not explicitly restrict Section 7 rights nonetheless violates Section 8(a)(1).[7] In *Boeing*, the Board only overruled *Lutheran Heritage* prong 1: "In this case, the

[7] Those situations include where: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647.

issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* 'reasonably construe' standard, which is also sometimes called *Lutheran Heritage* 'prong one' (because it is the first prong of a three-prong standard in *Lutheran Heritage*). . . . we have decided to overrule the Lutheran Heritage "reasonably construe" standard." *Boeing*, 365 NLRB slip op. at 1-2.

The ALJ's failure to specify that only the first prong of *Lutheran Heritage* was overruled in Boeing is significant because 1) he applied the third (not the first) prong in his initial decision[8]; and 2) unlike many of cases cited in the briefing,[9] under the facts of this case, the rule here is being evaluated in the context of having actually been applied to restrict employees' exercise of Section 7 rights. In fact, it was the frequent application of prong 1 (not prong 2 or prong 3) that the Board decried in *Boeing*:

> Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard,[4] which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).

Boeing, 365 NLRB, slip op. at 1.

[8] "In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)." ALJD, at *2.

[9] Examples of cases cited in the briefing that do not include application of the rule in question to the exercise of Section 7 rights are: *Boeing, supra*; *Rio All-States Hotel & Casino*, 362 NLRB No. 190 (2015); *Flagstaff Medical Center*, 357 NLRB 659 (2011); *Whole Foods Market, Inc.* 363 NLRB No. 87 (2015); *T-Mobile USA, Inc*., 363 NLRB No. 171 (Apr. 29, 2016); and *Verizon Wireless*, 2014 L.R.R.M. (BNA) ¶ 164472 (N.L.R.B. Div. of Judges July 25, 2014).

Exception 2

The Charging Party excepts to the ALJ's assertion that "if its rule is legal, Collings' statement to Marcus Davis must also be legal," and that "[t]he threat allegation in this case is wholly dependent on the policy's lawfulness or unlawfulness," and that "[e]nforcement of a legal rule cannot be a violation of the NLRA, unless, for example, it is enforced disparately."

Argument

The above language suggests that once an employer's rule has been deemed lawful on its face, the employer may apply it to interfere with employees' exercise of their Section 7 rights as long as that application is not discriminatory. This is contrary to the Board's repeated instructions in *Boeing*, as evidenced by the multiple quotes below.

> [T]he Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct. For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

Boeing, 365 NLRB, slip op. at 17.

> [E]ven when the Board concludes that a challenged rule was lawfully maintained, the Board will independently evaluate situations where, in reliance on the rule, an employer disciplines an employee who has engaged in NLRA-protected activity; and the Board may conclude that the discipline violated Section 8(a)(1) even though the rule's maintenance was lawful.

Id. at 22.

> Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. . . . Moreover, under the standard we

> announce today, when an employer lawfully maintains rules requiring employees to foster harmony and civility in the workplace, the *application* of such rules to employees who engage in NLRA-protected conduct may violate the Act, which the Board will determine based on the particular facts in each case.

Id. at FN 15.

> Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. The Board will determine in future cases what other types of rules fall into Category 1.

Id. at FN 76.

If the Board deems the Privacy of Communications Rule to be lawful, the company's application of that rule here should still be held unlawful because it was applied to the type of activity that the Supreme Court has deemed "the most fundamental purposes of the Act." *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975). Regardless of whether the meeting Davis attended was investigatory or solely disciplinary, his purpose in attending that meeting was 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.'" *Id*. at 261–62, *citing* 29 U.S.C. Section 151. In fact, this role was so important that is was included in the collective bargaining agreement. (J. Ex. 1 at 26.) And, the fact that this was a termination meeting (as opposed to in regards to a lower level of discipline) makes Davis' vigorous fulfillment of this role even more crucial.

In *Boeing*, the Board recognized the significance of the type of Section 7 activity involved "when deciding cases in this area," noting that "the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)." *Boeing*, 365 NLRB, slip op. at 16. Here, Davis' participation in his coworker's termination meeting—his gathering of information at that meeting—was central

to the Act. As union steward, Davis was responsible for supporting the employee, engaging with the employer where appropriate, and documenting as thoroughly as possible everything said in the meeting. This latter responsibility is particularly important given that "arbitrators [have] often held that discharge 'must stand or fall upon the reason given at the time of discharge'; [and] the employer cannot add other reasons when the case reaches arbitration." Elkouri & Elkouri, *How Arbitration Works,* 8th Ed., Bloomberg BNA, 2016, at Ch. 15.3.F.vi. [10] Furthermore, as the ALJ pointed out, an audio recording from a meeting between management and employees can be essential to validating the employees' report of what was said. (ALJSupp.D. 4:40-45, 5:1-18.) In fact, this case includes a perfect example: Davis and the company witness offered differing recollections as to whether a supervisor said that he had fired other employees for violating the rule in question. (ALJSuppD. 2:FN2.) It is perfectly plausible, therefore, that Davis and the company might have disagreed as to what was said in the termination meeting. Evidence of what was actually said—in particular as to the company's reasons for the discipline—is potentially crucial to proving the union's case if a grievance is filed and taken to arbitration.[11]

[10] *Quoting* West Va. Pulp & Paper Co., 10 LA 117, 118 (Guthrie, 1947); and *citing* E.&J. Gallo Winery, 80 LA 765, 769-70 (Killion, 1983); Nickles Bakery, 73 LA 801, 802 (Letson, 1979); Gardener Denver Co., 51 LA 1019, 1022 (Ray, 1968); Unimary, 49 LA 1207,1210 (Roberts, 1968).

[11] The fact that the union declined to file a grievance does not prove that Davis had no need to gather information. In fact, had the union felt it had insufficient information, it may have filed a grievance to preserve the time limits while it gathered additional information. In this respect, the audio recording can assist in streamlining the process.

Exception 3

The Charging Party excepts to the ALJ's failure to include in Section 2(c) of the order a requirement to post the notice nationwide.

Argument

As discussed in the General Counsel's exceptions and supporting brief, the ALJ's supplemental decision ordered a notice posting only to company retail stores in the District of Columbia. Because the Rule in question is maintained throughout the country, a nationwide posting is appropriate. *See., e.g., Serv. Merch. Co.,* 299 NLRB 1125, 1127 (1990). This is true even if the rule is deemed lawful, but the application unlawful, because the threat of discipline was to all unit employees, not just those in D.C. stores. *See Miller Grp.,* 310 NLRB 1235, 1236, FN 4 (1993). Moreover, the employer is a large company that relies heavily on a centralized human resources system. This is evident by the fact that the very same policy is used by one of its sister companies. *Michigan Bell Tel. Co.,* No. 07-CA-182505, 2017 WL 4334532 (Sept. 27, 2017).

Submitted with respect,

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CERTIFICATE OF SERVICE

I hereby affirm that this Cross Exceptions Brief was served on the parties listed below via email on August 26, 2019.

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